2010

# Alan, Suzy, and Aidan Reighard v. Steven Yates : Reply Brief

Utah Court of Appeals

IN THE UTAH SUPREME COURT

| | |
|---|---|
| ALAN REIGHARD, an individual; SUZY REIGHARD, an individual; AIDAN REIGHARD, a minor, by and through his general guardian, SUZY REIGHARD,<br><br>Plaintiffs and Appellees,<br>v.<br><br>STEVEN YATES, an individual; and DOES 1 through 10, Inclusive,<br><br>Defendant and Appellant. | **REPLY BRIEF OF APPELLANT AND BRIEF OF CROSS-APPELLEE**<br><br>Appellate Case No. 20100661 |

On Appeal from the Third District Court, Summit County
Honorable Bruce C. Lubeck


Daniel S. Drage
BOYLE & DRAGE, P.C.
2506 Madison Ave
Ogden, UT 84401
Attorneys for Appellees

Christine E. Drage
Trevor O. Resurreccion
WEIL & DRAGE, APC
23212 Mill Creek Drive
Laguna Hills, CA 92653
Attorneys for Appellees

Lincoln W. Hobbs (4848)
Julie Ladle (11223)
Kathy A.F. Davis (4022)
HOBBS & OLSON, L.C.
466 East 500 South, Suite 300
Salt Lake City, UT 84111-3342
Telephone: (801) 519-2555
Facsimile: (801) 519-2999
Attorneys for Appellant

IN THE UTAH SUPREME COURT

| | |
|---|---|
| ALAN REIGHARD, an individual; SUZY REIGHARD, an individual; AIDAN REIGHARD, a minor, by and through his general guardian, SUZY REIGHARD,<br><br>Plaintiffs and Appellees,<br>v.<br><br>STEVEN YATES, an individual; and DOES 1 through 10, Inclusive,<br><br>Defendant and Appellant. | **REPLY BRIEF OF APPELLANT AND BRIEF OF CROSS-APPELLEE**<br><br>Appellate Case No. 20100661 |

On Appeal from the Third District Court, Summit County
Honorable Bruce C. Lubeck


Daniel S. Drage
BOYLE & DRAGE, P.C.
2506 Madison Ave
Ogden, UT 84401
Attorneys for Appellees

Christine E. Drage
Trevor O. Resurreccion
WEIL & DRAGE, APC
23212 Mill Creek Drive
Laguna Hills, CA 92653
Attorneys for Appellees

Lincoln W. Hobbs (4848)
Julie Ladle (11223)
Kathy A.F. Davis (4022)
HOBBS & OLSON, L.C.
466 East 500 South, Suite 300
Salt Lake City, UT 84111-3342
Telephone: (801) 519-2555
Facsimile: (801) 519-2999
Attorneys for Appellant

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### Cases



### Statutes and Rules

## STATEMENT OF JURISDICTION

This Court has appellate jurisdiction over final orders, judgments and decrees of the Third District Court under Utah Code Ann. §78A-3-102(3)(j).

## DETERMINATIVE AUTHORITY

**Utah R. Civ. P. 68. Settlement Offers**

(a) Unless otherwise specified, an offer made under this rule is an offer to resolve all claims in the action between the parties to the date of the offer, including costs, interest and, if attorney fees are permitted by law or contract, attorney fees.

(b) If the adjusted award is not more favorable than the offer, the offeror is not liable for costs, prejudgment interest or attorney fees incurred by the offeree after the offer, and the offeree shall pay the offeror's costs incurred after the offer. The court may suspend the application of this rule to prevent manifest injustice.

(c) An offer made under this rule shall: (1) be in writing; (2) expressly refer to this rule; (3) be made more than 10 days before trial; (4) remain open for at least 10 days; and (5) be served on the offeree under Rule 5.

Acceptance of the offer shall be in writing and served on the offeror under Rule 5. Upon acceptance, either party may file the offer and acceptance with a proposed judgment under Rule 58A.

(d) "Adjusted award" means the amount awarded by the finder of fact and, unless excluded by the offer, the offeree's costs and interest incurred before the offer, and, if attorney fees are permitted by law or contract and not excluded by the offer, the offeree's reasonable attorney fees incurred before the offer. If the offeree's attorney fees are subject to a contingency fee agreement, the court shall determine a reasonable attorney fee for the period preceding the offer.

**Utah R. Evidence 702 Testimony by Experts**

(a) Subject to the limitations in subsection (b), if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

(b) Scientific, technical, or other specialized knowledge may serve as the basis for expert testimony if the scientific, technical, or other principles or methods underlying the testimony meet a threshold showing that they (i) are reliable, (ii) are based upon sufficient facts or data, and (iii) have been reliably applied to the facts of the case.

(c) The threshold showing required by subparagraph (b) is satisfied if the principles or methods on which such knowledge is based, including the sufficiency

of facts or data and the manner of their application to the facts of the case, are generally accepted by the relevant expert community.

## RESPONSE TO THE REIGHARDS' STATEMENT OF THE CASE

Many of the Facts set forth by the Reighards are irrelevant, conclusory and/or lack proper support from the record. The majority of their citations consist not of evidence properly presented to the jury, but rather to memoranda and affidavits submitted in connection with pretrial motions.[1] To the extent these mischaracterizations bear upon this Court's analysis, these mischaracterizations are addressed in Mr. Yates' Argument.

[1] The Reighards' "Facts" #s 1-9, 27-32, 47, and 48, refer generally to their Memorandum in Opposition to Defendant's Motion for Partial Summary Judgment Dismissing Negligence Claim (1st Cause of Action) and Exhibits; "Facts" #s 12-15 refer to the Affidavit of Suzy Reighard; "Facts" 16-18 refer to the Affidavit of Alan Reighard; "Facts" 22-24 refer to the Affidavit of Eugene Cole; "Facts" 33, 34 refer to the Affidavit of Sattar N. Tabriz, P.E.; "Facts" 37, 38 refer to the Affidavit of Shaan Sanderson. Mr. Yates sought to strike all of those affidavits; (R.510-12; 650-52); the court never ruled on these motions, rather indicating that it would "consider only the admissible portions of this and any other pleadings." (R.782) In many instances, those Affidavits were inconsistent with the testimony adduced at trial. *See* R.1700-03, generally.

## ARGUMENT

## REPLY TO APPELLEES' BRIEF

### I. BECAUSE MR. YATES OWED NO INDEPENDENT DUTIES, AS AFFIRMED BY *DAVENCOURT,* THE JURY'S AWARD FOR NEGLIGENCE SHOULD HAVE BEEN SET ASIDE.

As acknowledged by both parties in this matter, Mr. Yates acted as his own contractor when he built his home. However, when Mr. Yates sold the home to the Reighards nearly 2 ½ years later, his only relationship with the Reighards was as the seller of a knowingly used home.

The Reighards rely largely upon *Moore v. Smith,* 2007 UT App. 101, 158 P.3d 562, in arguing that Mr. Yates had independent duties as the builder of the home. The *Moore* case is legally distinguishable, because it did not even include a negligence claim. 2007 UT App 101, ¶7 ("The Moores filed this action in August 2000, alleging breach of contract, negligent misrepresentation, fraudulent nondisclosure, fraudulent misrepresentation, and violation of Utah's Consumer Sales Practices Act.") The duty established in *Moore* arose in connection with "a duty to disclose material information..." *Id.* at ¶36. On remand, the jury was to determine "whether the [Seller] had knowledge of the defects." In this case the jury was specifically asked if Yates used reasonable care in determining the truth of his assertions, and they found that he did (R.1446). The jury's determination in

this regard is subject to reversal only if no substantial evidence, or insufficient evidence, supports it. *Jensen v. Sawyers,* 2005 UT 81, ¶ 100; 130 P.3d 325. The court must "assume that the jury believed those aspects of the evidence which sustain its findings and judgment." *Stevensen 3rd E., L.C. v. Watts*, 2009 UT App 137, ¶ 26, 210 P.3d 977 (internal citations omitted).

*Moore* is also factually distinguishable from the instant case because the builder in *Moore* only lived in the home for three (3) weeks and had contracted with the Moores to sell the home before the construction of the home was complete. *Moore,* 2007 UT App. 101, Fn. 11. In contrast, Mr. Yates built the home intending it to be his own residence and lived in the home for nearly 2 ½ years before selling the home to the Reighards. (R.320). In *Moore*, the purchasers intended to purchase a new home and did so; in the instant matter, the Reighards intended to, and did in fact, purchase a used home.

*Davencourt* clearly clarified any ambiguity in *Moore* and *Yazd* and held that there is no independent duty to act without negligence in the construction of a home or to conform to building codes. *Davencourt at Pilgrims Landing Homeowners Association v. Davencourt at Pilgrims Landing, LC,* 2009 UT 65, ¶44 ("No common-law duty exists that creates a duty to conform to building codes."), ¶47 ("[T]he district court properly rejected the independent duty to act without negligence in the construction of a home."), 221 P.3d 234.

In response to Mr. Yates' argument regarding the applicability of *Davencourt*, the Reighards simply respond by saying that "the failure to conform to the building codes is a breach of Mr. Yates' independent duty as the contractor/builder/seller of the residence." Brief of Appellees and Cross-Appellants, p. 27. However, they cite no support for this contention and appear to confuse the issue of who owes the duty and what duty is actually owed.[2]

The only independent duty that Utah courts have recognized for a contractor-seller is an independent duty to disclose known material information regarding the real property. *Davencourt*, 2009 UT 65, Fn. 4 (citing *Yazd v. Woodside Homes Corporation*, 2006 UT 47, ¶35, 143 P.3d 283 (holding that a contractor-seller owes a home purchaser "a duty to disclose information known to him concerning real property"); *Moore*, 2007 UT App. 101, ¶ 36 (ruling that a contractor-seller owes a duty to disclose material information to home purchaser)); *see also Sunridge Development Corporation v. RB&G Engineering, Inc.,* 2010 UT 6, Fn. 8, 230 P.3d 1000 (stating that "the independent duty in *Yazd* was a duty to disclose known and material defects, not an independent duty to refrain from acting negligently"). This duty to disclose is unrelated to conforming to building

[2] The absence of duty in this case is also evident because the duties that Yates owed as a builder (if any) were owed only to himself as the owner/occupant. The Reighards cite no case which suggest that a contractor's duty to a purchaser (if any) extends to subsequent purchasers.

codes in the construction of a residence and as stated previously, *Davencourt* specifically holds there is no independent duty to build in conformity with the building code. *Davencourt,* 2009 UT 65, ¶¶ 41, 43.

In addition, and notably, the Reighards do not address Mr. Yates' further contention that there is no independent duty to act without negligence in the construction of a home. *Davencourt,* 2009 UT 65, ¶47. The Reighards' arguments that somehow the current state of the economy, Mr. Yates' trial strategy regarding experts, and the Reighards' self-serving and conclusory statements as to what Mr. Yates "conceded" in his deposition testimony[3] are irrelevant to this independent duty analysis.

Because of the lack of independent duties, and because the economic loss rule is applicable (as discussed below), this Court can and should set aside the jury's award for negligence.

[3] *See* Brief of Appellees and Cross-Appellants, p.24. Mr. Yates also points out the much of the deposition testimony referenced by the Reighards is not part of the record, and is not contained in R.397-415 and Exhibit "A," as cited by the Reighards.

## II. THE ECONOMIC LOSS DOCTRINE IS APPLICABLE AS THE REIGHARDS HAVE FAILED TO PRESENT ADMISSIBLE EVIDENCE OF BODILY INJURY.

In responding to Mr. Yates' arguments regarding lack of evidence regarding bodily injury in this matter, the Reighards counter by stating they "presented evidence at trial of the personal injuries and illness which Alan and Aidan suffered, which is itself directly attributable to Mr. Yates' substandard and negligent workmanship in the construction of the Residence." *See* Brief of Appellees and Cross-Appellants, p. 28. As support for this contention, they simply cite to the trial court's ruling (R.1627), which contains no such assertion.[4]

In reality, this contention is conclusory and untrue. While Mr. Reighard and Aidan Reighard may have suffered physical symptoms, there was no evidence that such effects were due to Mr. Yates' actions or inactions. The Reighards' contention completely ignores that they lived in the home for nearly two (2) years before experiencing any physical symptoms. (R.481, ¶13). The Reighards' contention also completely ignores that during their ownership, the Reighards had

[4] The trial court stated as follows: "Here, the jury found both economic and non-economic loss and awarded damages in a special verdict interrogatory. The court cannot and need not speculate what that was based upon, but it is clear some of the award was for non-economic damages and there was evidence offered relating to illness of a child." (R.1627).

various unidentified sprinkler repairs performed[5] after moving into the home and they had a deck installed where the deck contractor "scraped [] off the top layer of soil on the corner of the house where the mold was [later] discovered." (R. 248-49, 360-361).

The Reighards' contention also ignores the fact that neither of the two (2) medical doctors that testified at trial testified with any reasonable medical certainty that the alleged health effects suffered by Mr. Reighard and Aidan Reighard were causally connected to the mold found in the home. (R. 1700 at p. 65, 1701 at p. 145). And despite the Reighards potential confusion of the issue in their Statement of Facts No. 21, Dr. Cole, a Ph.D., did not testify as to causation of the health effects due to exposure to the mold. In contrast, Dr. Cole testified as follows:

> Q. You don't make any conclusion in your report as to medical causation between the mold and the symptoms that Alan or Aidan Reighard suffered; correct?
>
> A. I've looked at potential associations and relationships between the adverse environmental conditions and their adverse health symptoms.

[5] Yates sought to compel production of evidence respecting the nature of the Reighards' sprinkler and landscaping repairs (R.621-22A), and when no such evidence was produced, Yates sought a jury instruction respecting spoliation in connection with the Reighards' failure to produce evidence (R.1702, p. 207). That requested instruction was denied.

Q. But that is not a determination of medical causation between the conditions and their symptoms; correct?

A. Correct. I'm not a medical doctor. (R.1700, p. 46).

In addition, the jury awarded $0.00 in medical expenses. (R.1445).[6]

Clearly, the jury found that Mr. Reighard and Aidan Reighard suffered no physical injury that required compensation for medical expenses. As such, it is improper for the Reighards to speculate that all or part of the $2,500.00 awarded to the Reighards for non-economic damages (R.1445) stemmed from the physical effects allegedly suffered by Mr. Reighard and Aidan Reighard. The non-economic damages could just have easily been awarded for stress and inconvenience involved in repairing the home. Without clear evidence that physical injuries occurred in this matter, the Reighards claims are barred under the economic loss doctrine.

[6] The Reighards incorrectly assert that Yates' counsel failed to request an instruction respecting the need to prove personal injury damages with a reasonable medical certainty (Appellees' Brief, Statement of Facts, ¶55). In fact, Yates' counsel raised and preserved this issue (R.1702, p.197). ("The jury instructions do not adequately establish the specifications which medical-with which (sic) medical damages need to be proven.") At that point, the judge adjourned to finalize the instructions, without including the requested medical damages instruction.

## III. DR. EUGENE COLE, A PH.D., SHOULD NOT HAVE BEEN ALLOWED TO TESTIFY AT TRIAL REGARDING THE EFFECTS OF AND EXPOSURE TO THE MOLD

Mr. Yates has thoroughly briefed this issue related to Dr. Cole in his initial Brief and will respond as succinctly as possible to the issues raised by the Reighards. Utah R. Evid. 702 only allows for expert testimony that is (1) reliable, (2) based upon sufficient facts or data, and (3) has been reliably applied to the facts of the case. Dr. Cole's training and experience is irrelevant to the only relevant issue—whether or not Mr. Reighard's and Aidan Reighard's alleged symptoms were caused by the mold—and as such, his testimony should have been excluded under Utah R. Evid. 702.

The Reighards argue that Dr. Cole visited the Reighards' residence in preparation for his testimony, in an attempt to shore up his credibility. However, it is undisputed that his visit occurred long after the mold had been remediated.

In regard to Mr. Yates' argument that Dr. Cole could not testify as to the specific details about the mold in the residence, the Reighards respond by simply saying that mold can grow slowly and Dr. Drage has never seen Mr. Reighard and

Aidan Reighard with symptoms as serious as they were.[7] *See* Brief of Appellees and Cross-Appellants, p. 32. These arguments have absolutely no bearing on the issue. Clearly, if Dr. Cole had no information as to the type of mold or fungus that was growing in the Reighards' home, any opinions he would have would be unreliable.

The Reighards also attempt to shore up their arguments in favor of Dr. Cole by citing to testimony given by Dr. Drage and Dr. Cheung at trial. Again, it is entirely irrelevant to Dr. Cole's credibility that Dr. Drage testified about Aidan's allergy tests or that Dr. Cheung admitted there was mold in the residence and that it was prudent to remove the mold. *See* Brief of Appellees and Cross-Appellants, p. 33. The focus is on Dr. Cole and whether or not Dr. Cole had the ability to properly testify as an expert.

Finally, the Reighards cannot get around the fact that Dr. Cole had no information as to the type of mold to which the Reighards were exposed, Dr. Cole

[7] These explanations are, of course, materially inconsistent. If mold was growing slowly, the Reighards' alleged medical symptoms should have also extended over a long period of time. The inconsistency of the explanations reflects the speculative nature of any connection between the existence of mold and alleged symptoms.

had no information as to the duration of any exposure to mold,[8] Dr. Cole relied upon his own interpretation of medical records (although he is not an M.D.) and inconsistent testimony from Ms. Reighard as to the extent and timing of the symptoms allegedly suffered by Mr. Reighard and Aidan,[9] and the fact that Dr. Cole is not a medical doctor and cannot testify as to medical causation but only to "potential associations and relationships."[10] As such, Dr. Cole should not have been allowed to testify at trial.

## IV. THE REIGHARDS SHOULD NOT HAVE BEEN AWARDED COSTS AS PART OF THE FINAL JUDGMENT

In arguing that the "adjusted award" under Utah R. Civ. P. 68 was more favorable than Mr. Yates' $10,000.00 Offer of Judgment, the Reighards simply speculate as to the amount of attorney fees that may have been incurred between January 2007 and September 2007. *See* Brief of Appellees and Cross-Appellants,

---

[8] In response to the jury's question as to how long the mold had been growing, Dr. Cole stated he could not answer the question "[b]ecause we don't have a knowledge of when the water intrusion started, and it could be weeks, it could have been months." (R.1700, p. 53). Of course if it had been only weeks or even months, it would remove any possibility of improper nondisclosure by Mr. Yates, as the transfer of property had occurred over two years prior.

[9] R.1700, pp. 39, 41-43.

[10] R.1700, p. 46.

p. 36.[11] Again, speculation has no place in this matter and as the trial court did not consider the issue of attorney fees in this context, it would be improper for this Court to do so.

## V. MR. YATES, AND NOT THE REIGHARDS, PREVAILED AND, AS SUCH, SHOULD HAVE BEEN AWARDED ATTORNEY FEES AND COSTS

In their brief, the Reighards assert they were the prevailing party in this matter based upon the "net judgment rule." [12] *See* Brief of Appellees and Cross-Appellants, p. 41 (citing *Mountain States Broadcasting Co. v. Neale,* 783 P.2d 551 (Utah App. 1989)) (*Mountain States I).* However, while courts take this rule into consideration in their prevailing party analysis, the net judgment rule is only a "good starting point," but it should not be "mechanically applied." *Olsen v. Lund,* 2010 UT App. 353, ¶7, 671 Adv. Rep. 7 (internal citations omitted). Courts should

[11] The Reighards not only failed to present any evidence as to fees incurred prior to this date; they failed to properly present evidence to support any of their fee claim. Their Affidavit of Attorneys' Fees failed, in numerous respects, to provide the information required. *See* Declaration of Christine E. Drage, Esq. (R.1468-72) seeking $277,100.00 in attorney fees without any detail or support; following Yates' objection to that Affidavit, the Reighards submitted the Declaration of Trevor Resurreccion (R. 1541-44) which still failed to identify the matters required to support an award of attorneys' fees.

[12] The Reighards' reliance on *Mountain States* refers only to the initial opinion; on re-hearing of that very case, as reflected in the reported opinion, the Court of Appeals noted that the court's initial opinion contained an "oversimplification in our opinion which warrants comment and clarification." (783 P.2d at 557) the court clarified, "nothing in our opinion should be taken to suggest that the net judgment rule can be mechanically applied in all cases..."

take a flexible and reasoned approach and "look[] at the amounts actually sought and then balanc[e] them proportionally with what was recovered." *Olsen v. Lund,* 2010 UT App. at ¶7 (citing *A.K.& R. Whipple Plumbing & Heating v. Aspen,* 2004 UT 47, ¶26, 94 P.3d 270).

The Reighards were awarded a final judgment against Mr. Yates in the amount of $7,500.00 plus costs; this award was based solely upon the Reighards' negligence cause of action. (R.1445, 1627). However, Mr. Yates prevailed on the other six (6) causes of action that were brought against him by the Reighards. In addition, the $7,500.00 awarded was significantly less than the $100,000.00 that the Reighards sought as part of their closing argument.

In reality, Mr. Yates prevailed on 86% (= 6/7) of the claims brought against him and the jury awarded the Reighards only 12.5% (= $12,500/$100,000) of the damages they sought on the sole remaining claim (R. 1445); the trial court later reduced this percentage to a mere 7.5% (= $7,500/$100,000) after reducing the jury verdict by the $5,000.00 settlement with E. Marshall Plastering. (R. 1627). Under the "flexible and reasoned approach," Mr. Yates clearly prevailed in this action.

Further, Mr. Yates prevailed on the Breach of Contract Cause of Action, the only cause of action that provides for attorney fees. (R. 1448). Still further, and as outlined above, Mr. Yates should have also prevailed on the negligence cause of action, causing him to prevail on every cause action, and clearly making him the

prevailing party. As such, the trial court erred in ruling that this case was a "draw." (R. 1632). *See also Olsen v. Lund,* 2010 UT App. 353, ¶¶8,14; *Mountain States Broadcasting Co. v Neale,* 783 P.2d 551, 558 (Utah App. 1989)(describing a 50% recovery as a draw).

The Reighards make the argument that Mr. Yates cannot be the prevailing party because he refused to accept an Offer to Compromise from the Reighards in June 2008. *See* Brief of Appellees and Cross-Appellants, p. 38. This argument is unsupported by any authority, as there is no authority to support such claim. Utah R. Civ. P. 68 deals with costs and attorney fees, not whether a party is or is not the prevailing party and has no bearing on the prevailing party analysis.

Further, the Reighards take issue with the fact that Mr. Yates never filed a Motion for Attorney Fees. However, failure to file a formal motion does not fail to preserve an issue on appeal. *O'Dea v. Olea*, 2009 UT 46, ¶18, 217 P.3d 704 (stating that to properly preserve an issue for appeal, the issue must be timely and specifically raised and must be accompanied by evidence or relevant legal authority). Mr. Yates raised the issue of attorney fees in his Memorandum in Opposition to Plaintiffs' Motion for Award of Attorney's Fees and Expert Costs and specifically stated "Defendant will by separate motion, seek an award of his attorney fees. That motion, however, is arguably premature in light of the pendency of other motions." (R.1515). Based upon Judge Lubeck's unfavorable

rulings on the post-trial motions, an attempt by Mr. Yates thereafter to file a Motion for Attorney Fees would have been fruitless if not also improper. [13]

Finally, the Reighards claim that Mr. Yates has made this a "make work" case, and therefore he should not be awarded any attorney fees.[14] *See* Brief of Appellees and Cross-Appellants, p. 38. Mr. Yates vigorously denies this allegation and it has no place in the prevailing party analysis. "None of our cases weigh the result achieved at trial against the sacrifice in time, trouble, and expense required to attain that result...[w]hen our cases speak of the 'comparative winner,' the comparison is to the other party, not to the toll of the litigation process." *Olsen v. Lund,* 2010 UT App. 353, ¶12 (internal citations omitted).

---

[13] The Reighards also argue that they "were never given the opportunity to respond to such a request [for attorney fees], and Mr. Yates failed to produce any evidence of the amount of attorney's fees that he could possibly be seeking" and therefore Mr. Yates should not be awarded attorney fees. Brief of Appellees and Cross-Appellants, p. 37. However, the issue of the amount and reasonableness of any attorney fee award would be remanded to the trial court, making the Reighards' concerns in this regard unwarranted. And, it is hard to imagine how the Reighards, who sought compensation for 1,108.4 hours, could challenge the reasonableness of Yates' counsels' less than 800 hours. (R.1512, p.6, fn 3)

[14] Again, the argument is contrary to the hours incurred by the parties' counsel through trial; Plaintiffs sought compensation for about 40 percent more hours than Defendant had incurred through trial. (R.1512, p.6, fn 3)

## RESPONSE TO BRIEF OF CROSS-APPELLEE[15]

## VI. THE TRIAL COURT'S REDUCTION OF THE JURY'S VERDICT FROM $12,500 TO $7,500 WAS APPROPRIATE

Mr. Yates sought, in this case, to have the jury instructed respecting apportionment of damages. (R.1229, R.1702 at p.178). The Reighards argued against apportionment and the trial court denied Mr. Yates' request. (R.1702, pp. 175-177, 182). Instead, the court provided the jury with Jury Instruction No. 43, which provided in pertinent part, "If there was such a settlement involving compensation, and you return a verdict for Plaintiffs and award damages, I will make any proper adjustments of your award to Plaintiffs." (R.1430).

In this case, the award of $12,500.00 was awarded in connection with the negligence cause of action. (R.1445). Based upon the court's jury instructions, the court properly reduced the jury's finding of $12,500.00 by the $5,000.00 received by the Reighards from E. Marshall Plastering. The Reighards cannot argue against apportionment and for a reduction in the jury verdict in connection with the jury instructions (R.1702, pp.175-177, 182) and thereafter take an about face arguing that the court erred in reducing the award.

---

[15] On December 30, 2010, Mr. Yates filed a Motion to Dismiss the Cross Appeal. The arguments presented below are presented in the event that the Cross Appeal is not dismissed. In presenting these arguments, Mr. Yates does not waive his argument that the Cross Appeal was untimely, and should be dismissed.

The Reighards argue that the jury's finding of $12,500.00 may have been based upon Mr. Yates' own negligence; the Reighards speculate the jury may have awarded those damages based upon the grading. Obviously, such speculation has no place. Furthermore, it was the jury's determination that the total of the damages suffered by the Reighards as a result of Mr. Yates' negligence (including the alleged negligence in overseeing the subcontractors) was $12,500.00. Regardless of whether that is to compensate for grading, or stucco, or window, or sprinkler installation, the jury awarded $12,500.00 in total damages and this amount must be reduced by amounts received from other parties.

The Reighards' argument that E. Marshall Plastering needed to be joined in connection with apportionment is inaccurate. The Reighards themselves attempted to join E. Marshall Plastering in an untimely fashion; this request was denied. (R.741, 899-900). The fact that E. Marshall Plastering was not joined does not change the fact, however, that the Reighards received $5,000.00 from E. Marshall Plastering, and the trial court determined it would appropriately reduce the jury's verdict, once determined, based upon amounts already received by the Reighards. Having made this determination, having instructed the jury that this would be done, and having responded to Mr. Yates' request for apportionment by indicating

this would be the resolution, this Court appropriately reduced the jury verdict to $7,500.00.[16]

## VII. THE TRIAL COURT CORRECTLY UPHELD THE JURY'S VERDICT IN FAVOR OF MR. YATES REGARDING THE BREACH OF CONTRACT AND NEGLIGENT MISREPRESENTATION CAUSES OF ACTION[17]

At the close of trial in this matter, the jury found in favor of Mr. Yates on both the breach of contract and the negligent misrepresentation causes of action. (R.1446-1448). After the trial, the Reighards filed a Partial Motion for Judgment Notwithstanding the Verdict seeking a reversal of these findings. (R.1495-96). This Motion was denied by the trial court (R.1635) and this Court should affirm that denial.

The Reighards base their arguments related to both the breach of contract claim and the negligent misrepresentation claim largely on the premise that it does not matter whether Mr. Yates had actual knowledge of the construction defects at

---

[16] The Reighards' contention that fault cannot be apportioned to non-parties is also legally inaccurate; Utah Code Ann. §78B-5-821(4) specifically allows the apportionment of fault to identified non-parties in this case. E. Marshall Plastering was clearly known to be a potential tort-feasor to both parties, from the outset of the litigation.

[17] The Reighards incorrectly set forth the standard of review for denial of a judgment notwithstanding a verdict; the case that they cited clearly states: "We reverse only if, viewing the evidence in the light most favorable to the party who prevailed, we conclude that the evidence is insufficient to support the verdict." *Hansen v. Stewart,* 761 P.2d 14, 17 (Utah 1988).

the residence or not. This is not the appropriate standard for negligence, and it is clearly not the appropriate standard with respect to the contract.

The appropriate standard is whether or not Mr. Yates had actual knowledge of material information regarding the property. The Seller Disclosures, which contain the alleged "misrepresentations" by Mr. Yates clearly indicate that the standard is actual knowledge. The Disclosures required Mr. Yates to "thoroughly discuss [his] *actual* knowledge regarding the condition of the Property" and by signing the Disclosures, Mr. Yates verified that the "information contained [therein] [was] accurate and complete to the best of [Mr. Yates'] *actual* knowledge as of the date signed by [Mr. Yates]." (R.001(Complaint) at Exhibit "B," pp. 1, 5)(emphasis added).

In addition, the independent duty of a contractor-seller (if Mr. Yates owed any such duty to the Reighards) is to disclose *known* material information regarding the property. *Davencourt,* 2009 UT 65, ¶30 ("A contractor-seller owes an independent duty to a home purchaser to disclose *known* material information regarding the real property.")(emphasis added)(citing to *Yazd,* 2006 UT 47); *see also Sunridge,* 2010 UT 6, Fn.8 ("The independent duty in *Yazd* was a duty to disclose *known* and material defects, not an independent duty to refrain from acting negligently")(emphasis added).

There was no evidence presented at trial that Mr. Yates knew of the defects the Reighards claim were present in their residence. In addition, the jury determined that Mr. Yates used reasonable care in determining whether the representations were true. (R.1446).

Further, the Reighards presented no evidence at trial that the representations made by Mr. Yates were in fact not true. For example, the Reighards presented no evidence at trial that there was moisture behind the stucco at the time Mr. Yates sold the residence.[18] The allegation that there was moisture behind the stucco 2 ½ years after the residence was sold does not mean that there was moisture behind the stucco at the time of the sale. In fact, the Reighards own expert stated it was unknown when the water intrusion started. (R.1700 at p. 53). The Reighards also make no mention of the fact they altered the sprinklers, changed the landscaping, and built a deck in the years following the sale of the residence in claiming that Mr. Yates is responsible for the water intrusion in their home. (R.248-49, 360-61).

Still further, the Reighards claim that Mr. Yates made representations in his Seller's Disclosures regarding building code violations. Due to the lack of citation in the Reighards' brief as to what section of the Disclosures to which they are

---

[18] Mr. Yates marked "no" to Section 10(c) of the Seller's Disclosures which state: "With the exception of regular maintenance of the exterior surfaces of the Property (painting, staining, etc.) are you aware of any past or present problems with any portion of the exterior, for example, moisture damage behind stucco, etc.?" (R.001 (Complaint) at Exhibit "B," p.3). The Reighards claim this was a misrepresentation.

referring, Mr. Yates cannot adequately respond as there is no specific reference to building codes in the Disclosures. However, even if building code violations are part of the Seller's Disclosures, the Seller's Disclosures seek actual knowledge; there is no evidence Mr. Yates had such knowledge.

Furthermore, neither the Reighards nor this Court can ignore the other holdings of *Davencourt* which established the duty of a builder, even in connection with new homes (in contrast with the instant matter, where it is undisputed the Reighards purchased a used home), is limited. *Davencourt* specifically held that a contractor does not have an independent duty to build in conformity with the building code and Utah does not recognize an independent duty to act without negligence in the construction of a home. *Davencourt,* 2009 UT 65, ¶¶41, 45-48.

Specifically in regard to the breach of contract claim, the Reighards argue that the Special Verdict Form must have confused the jury. *See* Brief of Appellees and Cross-Appellants, pp. 47-48. While not only demeaning to the jury, this argument is pure speculation. The form of the verdict was not only reviewed by the Reighards' counsel but was also essentially their proposed form. (R.1169 at Exhibit "A," p. 5). The Reighards' counsel expressly assented to the form of the verdict, waiving any appeals arising therefrom. (R.1702, p. 205)(Court: "any objections to other comments on the special verdict form?" Ms. Drage: "No, your Honor, thank you."). The Reighards' after-the-fact attempt to argue the inaccuracy

of the jury's factual findings on forms proposed by them cannot and should not be condoned. The jury heard the information provided and gave the weight to the information as they saw fit and this Court should affirm the trial court's denial of the Reighards' JNOV Motion.[19]

## CONCLUSION AND RELIEF SOUGHT

By this appeal, Mr. Yates asks this Supreme Court to rule that Mr. Yates had no independent duty to the Reighards as a builder/contractor because Mr. Yates was acting in the capacity of a seller of a used home when he contracted with the Reighards. The trial court's ruling that Mr. Yates owed an independent duty to the Reighards (and the trial court's denial of Mr. Yates' various motions in that regard) should be reversed.

For the same reason, the trial court's denial of Mr. Yates' Motion for Judgment Notwithstanding the Verdict should be reversed based upon the *Davencourt* opinion. Mr. Yates did not have a duty to act without negligence in the building of the home and there is no independent duty to conform to building codes. Further, because the jury found no physical injury and there was no admissible evidence of physical injury to Mr. Reighard and Aidan, the economic loss doctrine bars the Reighards' claims for negligence. The only plausible

[19] The Reighards included additional information relating to required mediation of the case as part of their Partial Motion for Judgment Notwithstanding the Verdict. However, this information was not provided to the jury, and as such, has no bearing of the reasonableness of the jury's actions. (R.1502).

evidence respecting physical injury came through Dr. Cole; he should not have been allowed to testify as to the effects of mold on Mr. Reighard's and Aidan's health, and if his testimony had been properly excluded the economic loss rule would apply.

In addition, because Mr. Yates was the prevailing party, and should be the sole prevailing party in this matter following the reversal of the negligence award, Mr. Yates should be awarded his costs and attorney fees under the REPC and the trial court's denial of these fees should be reversed. The trial court's award of costs to the Reighards should also be reversed under Utah R. Civ. P. 68, and Mr. Yates' costs should be awarded.

Finally, Mr. Yates seeks this Court to affirm the trial court's denial of the Reighards' Motion for Judgment Notwithstanding the Verdict, as the jury properly found in favor of Mr. Yates on both the negligent misrepresentation and breach of contract causes of action. Lastly, in the event it is not mooted by other holdings, this Court should affirm that the trial court also properly reduced the amount of the jury's verdict against Mr. Yates from $12,500.00 to $7,500.00 to reflect the settlement amount received by the Reighards by E. Marshall Plastering.

Mr. Yates also seeks his costs and attorney fees incurred in this appeal, based upon the provision of the Real Estate Purchase Contract providing for attorneys fees.

DATED this 7 day of February, 2011

LINCOLN W. HOBBS
JULIE LADLE
KATHY A.F. DAVIS
HOBBS & OLSON, L.C.
Attorneys for Appellant

## CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of the foregoing Reply Brief of Appellant and Brief of Cross-Appellee were mailed to the following:

Daniel S. Drage
BOYLE & DRAGE, P.C.
2506 Madison Ave
Ogden, UT 84401

Christine E. Drage
Trevor O Resurreccion
WEIL & DRAGE, APC
23212 Mill Creek Drive
Laguna Hills, CA 92653

and an original and nine copies were filed with the clerk of the appellate court.

DATED this 7 day of February, 2011.

LINCOLN W. HOBBS
JULIE LADLE
KATHY A.F. DAVIS
HOBBS & OLSON, L.C.
Attorneys for Appellant